No. 03-1112

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

TERRY LYNN BARTON,

Defendant-Appellee.

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
The Honorable Richard P. Matsch
District Court Judge
(D.C. No. 02-CR-255-M)

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Oral Argument is Requested

June 2, 2003

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PRIOR OR RELATED APPEALS

None.

STATEMENT OF JURISDICTION

1. The district court had jurisdiction to hear this criminal case under 18 U.S.C. § 3231.

2. The government seeks review of the sentence under 18 U.S.C. § 3742(b) and 28 U.S.C. § 1291. The Solicitor General has approved this appeal, satisfying the requirements of § 3742(b). (Attached at 1.)

3. The appeal is timely: final judgment was entered on February 24, 2003; the notice of appeal was filed on March 23, 2003. (Appendix 1 at 94.)

ISSUE PRESENTED FOR REVIEW

Stating that it did not want to sentence the defendant to a "lifetime of poverty," the district court denied restitution on the ground that the necessary calculations would unduly complicate and prolong the sentencing process. *Did the court abuse its discretion in making this ruling when (1) restitution is mandatory under the governing statute and (2) the government's uncontested calculation was based on actual, out-of-pocket expenses?*

STATEMENT OF THE CASE

Terry Barton pled guilty to Setting Fire on Lands of the United States, in violation of 18 U.S.C. § 1855, and Making a False Statement within the Jurisdiction of the United States, in violation of 18 U.S.C. § 1001. (Appendix 1 at 11-12, 36-37.)

The court sentenced Barton to six years in prison but declined to order restitution. (Appendix 1 at 81, 92, attached at 40, 44.)

STATEMENT OF THE FACTS

Underlying offense

In May 2002, in response to dangerously dry conditions, the United States Forest Service issued a ban on campfires in the Pike National Forest. To enforce this ban, the Forest Service assigned Terry Barton to patrol camping areas within the forest. (Appendix 1 at 13-15.)

In June 2002, Barton started a forest fire. The fire – which became known as the "Hayman fire" – burned for 17 days and covered 138,000 acres. (Appendix 1 at 16.) At first, Barton told federal investigators that she had discovered the fire while on patrol. She later admitted that

she had started the fire. (Appendix at 1 at 16-21.)

"Loss" under § 2B1.1

In December 2002, Barton executed a plea agreement that contained, among other things, a discussion of the appropriate sentencing range under the United States Sentencing Guidelines. (Appendix 1 at 22-24.) For purposes of determining the offense level under USSG § 2B1.1, the prosecution stated (and Barton accepted) that the United States had sustained losses totaling $38 million. (Appendix 1 at 16, 23.)

"Value" under § 3663A

A short time later, the government made its restitution request under the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A. Because the government wanted to avoid a time-consuming inquiry into the value of the Pike National Forest, it did not request the $38 million that it had stated as the loss for sentencing purposes. Instead, it asked for approximately $14.7 million, which is the amount that it spent to repair the area damaged in the fire. (Appendix 2 at 53-54.[1])

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[1] Appendix 2 contains the presentence report. It is filed under seal.

The government supported its request with the affidavit and report of soil scientist Kenneth Kanaan. (Appendix 2 at 56-63.) Kanaan provided the following information:

- The Hayman fire degraded approximately 60% of the watershed that supplies the Denver metropolitan area. (Appendix 2 at 56.)
- In order to prevent flooding and sedimentation into the streams and lakes of the watershed, the United States undertook emergency rehabilitation measures, such as mulching and reseeding. (Appendix 2 at 56-61.)
- The United State incurred various expenses in this effort, which totaled $14,671,510. (Appendix 2 at 62.)

Ruling on restitution

In February 2003, the district court held a sentencing hearing. (Appendix 1 at 43-79, attached at 2-38.) During this hearing, the court addressed the government's request for $14.7 million in restitution. The court was hostile to the government's request for two reasons.

First, the court thought that restitution would impose an undue financial hardship on Barton:

[T]here is in this case a great concern of mine in exercising

> moral judgment as to whether this woman should be sentenced to a lifetime of poverty, because that's what this restitution order would mean.

(Attached at 14.)

Second, the court thought that it would be impossible to calculate the value of the forest:

> You know, it's pretty unreasonable, it seems to me, to say in applying this language, the value of the property, that you can ascribe any value to this property as opposed to saying it's priceless.

(Attached at 15.)

In response to the court's concerns, the government observed that (1) restitution is mandatory under the applicable statute (Attached at 16-18), and (2) the government had avoided the need for a complicated inquiry into value by requesting only the amount that it had spent on emergency rehabilitation. (Attached at 19.)

But the court nevertheless refused to order restitution:

> Upon findings that determining the value of the Pike National Forest on June 8, 2002, and the number of identifiable victims of the catastrophic fire caused by the defendant's conduct and the amount of loss make restitution impracticable and involves such complex issues of fact as would complicate and prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing

> process, the court declines to order restitution under the authority of [18 U.S.C. § 3663A(c)(3)].

(Appendix 1 at 85, attached at 44.)

SUMMARY OF THE ARGUMENT

The court believed that it would be unfair to order restitution in this case, even though restitution is mandatory. It therefore employed a narrow interpretation of the MVRA as a way to negate the government's request. The court implicitly found that the government's calculation was invalid because it was not based on a threshold determination of the "value of the property on the date of the damage."

But the MVRA is satisfied if the calculation reflects the loss caused by the defendant, even if there has been no determination of the "value of the property on the date of damage" as an abstract matter. The government's request was a fair measure of loss in this regard, for it was based on the amount that the United States actually spent to repair the damage caused by Terry Barton. To the extent that the government's calculation was inaccurate, the error inured to Barton's

benefit.

The court therefore should have used the government's calculation as the basis for a restitution order. This would have placed no burden on the sentencing process, for the calculation was complete, well-supported, and uncontested. The public has a substantial interest in an order of restitution, even though Barton may never repay the full amount.

ARGUMENT

The district court abused its discretion when it declined to order restitution.

A. Standard of review

Relying on 18 U.S.C. § 3663A(c)(3), the district court found that calculating restitution would be so complicated, and would cause such delay, that the need for restitution was outweighed by the burden on the sentencing process. (Attached at 44.) This is a decision that must be reviewed for an abuse of discretion. *See United States v. Richard*, 738 F.2d 1120, 1122 (10th Cir. 1984) (under 18 U.S.C. § 3579, the judge must decide whether imposing restitution would unduly complicate or prolong the sentencing process; this decision will not be overturned absent an abuse of discretion).

B. Discussion

It is fair to say that the government approached the district court with a proper request for restitution:

- Barton committed an offense that requires an order of restitution under the MVRA. Setting fire on lands of the United States – a violation of 18 U.S.C. § 1855 – is "an offense against property" within the meaning of 18 U.S.C. § 3663A(c)(1)(A)(ii).
- The United States was the victim of Barton's offense. *See United States v. Quarrell*, 310 F.3d 664, 677 (10th Cir. 2002) (government can be a victim under the MVRA).
- It was evident and undisputed that the United States spent $14,671,510 to repair the watershed damaged in the Hayman fire. (Appendix 2 at 62; Attached at 20.)
- The United States is entitled to restitution for this kind of expense. *See Quarrell*, 310 F.3d at 664 (the district court should not have awarded restitution for the loss of archaeological value, but it properly awarded restitution for restoration and repair of a site in the Gila National Forest); *United States v. Overholt*, 307 F.3d 1231, 1253 (10th Cir. 2002) (district court did not commit plain error in

ordering restitution for environmental clean-up expenses sustained by the Coast Guard, even though the Coast Guard did not own the property); *United States v. West Indies Transp., Inc.*, 127 F.3d 299, 315 (3rd Cir. 1997) (the district court did not abuse its discretion by basing restitution on the cost of cleaning up environmental damage to the navigable waters of the United States).

Presented with this request, the district court nevertheless denied restitution on the ground that it would unduly complicate and prolong the sentencing process. (Attached at 20-21, 44.) This raises two related questions: (1) Why would the court do this? (2) How could the court find that it would be too complicated to calculate restitution, when it had before it a simple, well-supported, and uncontested request for $14,671,510?

The government believes that it can answer these questions. The government also believes that the court was wrong at each step.

1. *The court wanted to avoid the statutory mandate because it thought that the result would be unfair.*

The district court obviously did not want to saddle Barton with a restitution order of $14.7 million. The court recognized that Barton is unlikely ever to have a lot of money. (Attached at 21.) And, in the court's view, it would be unfair to award such a large amount of restitution under the circumstances. (Attached at 13-14, 21.)

But the court also knew that restitution is mandatory under the MVRA. (Attached at 18.) Thus, the court was faced with a choice between following a statutory mandate or its own sense of fairness. And the court

apparently decided that the statute had to give way:

> And, you know, there is still I think in the criminal law, despite all of the formulas that we have and sentencing guidelines, and these things, there's still a place for moral judgment. That's why sentences are still imposed by judges instead of computers. And there is in this case a great concern of mine in exercising moral judgment as to whether this woman should be sentenced to a lifetime of poverty, because that's what this restitution order would mean.

(Attached at 14.)

> And I am also not going to sentence Ms. Barton, as I've already said, to a life of poverty. It might be more humane to sentence her to life imprisonment. At least she'd get square meals and a place to sleep. And I'm not going to do that, and I believe that this position is justified by the language of this statute, and I don't believe that in

> adopting this language, the Congress of the United States respectfully had in mind restitution of almost $15 million of a person who was employed by the Forest Service making about $25,000, and who will have a great deal of trouble finding another job when she gets out of prison.

(Attached at 21.)

The government believes that the court tried too hard to vindicate its subjective sense of fairness. Whether it is fair to impose a large restitution order is a question that can yield various answers, depending on one's viewpoint. And though it is legitimate, a judge's view of the subject is not informed by special knowledge that lies outside the reach of other citizens. Thus, when the citizens' elected representatives have decided together that restitution must be awarded in a category of cases, a judge should subordinate his own view to the contrary.

Of course, the court's underlying concern remains valid: We cannot make Terry Barton pay a lot of money if she does not have a lot of money. But this is a concern that the court can address when it sets the payment schedule under 18 U.S.C. § 3664(f)(2)(A). The court may order Barton to make low, even nominal, payments toward restitution. 18 U.S.C. § 3664(f)(2)(B). The court cannot, however, use Barton's

financial condition as a reason to deny restitution outright. 18 U.S.C. § 3664(f)(1)(A).

2. The court incorrectly thought that the government's calculation did not satisfy the statute. This legal error led the court to commit an abuse of discretion.

When the court declined to order restitution, it did not find that the *government's* calculation was too complicated. Instead, it said that the *statutory* calculation would be too complicated:

> I believe that this case, if we were actually to apply the language of the statute, that is to say the value of the property on the date of the damage, loss or destruction, does create such complex issues of facts that determining that with some accuracy would require lengthy proceedings.

(Attached at 20-21.)

Implicit in the court's language are three observations:

- Restitution under the MVRA is calculated according to a formula that requires the court to determine, as a threshold matter, the "value of the property on the date of the damage, loss, or destruction." 18 U.S.C. § 3663A(b)(1)(B)(i)(I).
- The government's calculation did not comport with the statutory

formula because it did not start with the "value of the property on the date of damage." Therefore, the government's calculation could not form the basis of an order against Terry Barton.

- The need for restitution is not substantial in this case. It does not justify the complex and time-consuming process of calculating restitution under the statute.

As shown below, however, these observations are wrong.

One can calculate restitution without determining the "value of the property on the date of the damage."

The statutory formula is designed to measure the extent of damage caused by the defendant's conduct. The formula does this by highlighting the *difference* in the value of the property, before and after the offense:

> The order of restitution shall require that such defendant –
> (1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –
> (A) return the property to the owner of the property or someone designated by the owner; or
> (B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an

amount equal to –
(i) the greater of –
(I) *the value of the property on the date of the damage*, loss, or destruction; or
(II) the value of the property on the date of sentencing, less
(ii) *the value (as of the date the property is returned) of any part of the property that is returned*;

18 U.S.C. § 3663A(b)(1) (emphasis added).

The statute is thus satisfied whenever the court calculates the difference in value caused by the offense, irrespective of whether the court first contemplates the "value of the property on the date of the damage" as an abstract matter. This would happen, for example, when the court determines the difference in value by relying on the cost of repairs. *See e.g., United States v. Sharp,* 927 F.2d 170, 173-74 (4th Cir. 1991) (for damage caused by the bombing of a coal mine, restitution properly reflected the cost of supplies for repairs to the mine and payroll for those who performed the repairs).

The government's request comported with the statutory formula.

In Barton's case, the restitution request was based on the cost of emergency repairs to the watershed. The $14.7 million figure was thus

a reasonable measure of the damage – the difference in value – caused by Barton's conduct.

True, the measure was imperfect. But the business of determining restitution "is by nature an inexact science." *United States v. Teehee*, 893 F.2d 271, 274 (10th Cir. 1990). "[E]ven in those cases where the precise amount owed is difficult to determine, a court's authority to deny restitution is limited." *Id. See also United States v. Futrell*, 209 F.3d 1286, 1290-92 (11th Cir. 2000) (restitution amounts under the MVRA may be approximated); *United States v. Savoie*, 985 F.2d 612, 617 (1st Cir. 1993) (so long as the basis for reasonable approximation is at hand, difficulties in achieving exact measurements will not preclude a court from ordering restitution); *United States v. Hand*, 863 F.2d 1100, 1104 (3rd Cir. 1988) (Congress instructed that where the precise amount is difficult to determine, the court may make an expeditious, reasonable determination by resolving uncertainties with a view toward achieving fairness to the victim), *quoting* S. Rep. No. 532 at 31, reprinted in 1982 U.S. Code Cong. & Admin. News at 2537.

To the extent that the government's calculation was imperfect, Barton was the beneficiary. (If there is a flaw in the government's

approach, it could only be that the government *understated* the damage done to the Pike National Forest.[2]) This is important, for there is no harm in relying on an imperfect measure of restitution if the amount ordered is less than the amount of damage caused.

But there is harm in the approach employed by the district court in this case. The MVRA's underlying purpose is frustrated when a court says to the victim, in effect, "You didn't ask for enough, so you get nothing." *Cf. United States v. Grimes*, 173 F.3d 634, 639 (7th Cir. 1999) ("The present case may be one in which so many of the defendant's victims are unidentifiable that full restitution is impossible. But it could not have been the intention behind the [18 U.S.C. § 3663A(c)(3)] to bar restitution to those victims who are identifiable merely because others are not.")

Therefore, the district court erred when it implicitly rejected the government's uncontested calculation of the amount of restitution.

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[2] *See* Appendix 2 at 53-54, 65: Loss calculation of $38 million was based, in part, on the salvage value of timber. Other measures – such as aesthetic value of timber – could yield higher totals.

If the court had used the government's calculation, there would have been no burden on the sentencing process.

The court's legal error led to a ruling that constitutes an abuse of discretion. *See Koon v. United States*, 518 U.S. 81, 100 (1996) (a district court by definition abuses its discretion when it makes an error of law), *citing Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (a district court would necessarily abuse its discretion if it based its ruling on an erroneous interpretation of the law or on a clearly erroneous assessment of the evidence).

If the court had used the government's uncontested calculation, it could not have found that restitution would unduly burden the sentencing process:

1. The government's request would have placed *no burden* on the sentencing process. It would have taken no time or effort to calculate the amount of restitution, for the calculation was already complete: Kenneth Kanaan's materials show that the government spent $14,671,510 to repair the watershed damaged by the Hayman fire (Appendix 2 at 56-63); Barton did not dispute the purpose of the expenditures or the amount spent. (Attached

at 20.)

2. On the other hand, the need for restitution is significant. Although Barton is unlikely to repay all $14.7 million, it is possible that she might one day gain wealth by capitalizing on her notoriety. And the public has an interest in seeing that Barton is held responsible for her offense, even in a symbolic sense.

CONCLUSION

The case should be remanded with instructions to order restitution in the amount of $14,671,510.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because the case presents an issue of first impression.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2003, a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** was placed in the United States mail, first class postage prepaid, addressed to the following:

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